

CHONG CHEN FOH

A

v.

TAN LAI SOON

HIGH COURT MALAYA, MUAR

B

UMI KALTHUM ABD MAJID J

[ORIGINATING SUMMONS NO: 25NCVC-11-04-2012]

18 DECEMBER 2012

LEGAL PROFESSION: *Advocates and solicitors - Misconduct - Suspension from practice - Appeal against - Findings and recommendations of Disciplinary Committee and Disciplinary Board - Whether there was sufficient appreciation of evidence - Whether irrelevant considerations taken into account - Whether Disciplinary Committee misdirected itself in finding appellant culpable of deceit, misrepresentation and guilty of gross improper conduct - Whether appeal allowed*

C

D

The appellant appealed against the decision of the Disciplinary Board (“DB”) (“the said decision”) under s. 103E of the Legal Profession Act 1976 (“the Act”) affirming the finding of liability and recommendation on punishment by the Disciplinary Committee (“DC”) and ordering that the appellant be suspended from practice as an advocate and solicitor for a period of one year. The appellant prayed for the decision to be set aside. On 19 June 2006, the appellant was instructed by CY Tan to act for him in the purchase of a piece of land (‘the said land’). The respondent was then the owner and vendor of the said land. The appellant was given to understand by CY Tan that the parties’ instructions were, amongst other things, that CY Tan had paid the deposit amount of RM10,000 to the respondent to secure the purchase of the said land and that the respondent was given the option to repurchase or terminate the sale of the said land (“the said option”) within six months from the date of the sale and purchase agreement (“the cooling-off period”). On 22 June 2009, the respondent together with his son went to the appellant’s office to execute a sale and purchase agreement (‘SPA’), an undated memorandum of transfer and power of attorney in respect of the said land. The appellant had explained the terms of the SPA and went on to execute the SPA and the power of attorney. On 4 December 2009, the registration of the said land in CY Tan’s name was effected after obtaining the state authority’s consent for the transfer. Seven months after the signing of the SPA and after the said option had lapsed, the appellant’s clerk was handed the

E

F

G

H

I

- A respondent's letter. The said letter made reference to the said land and referred to the accompanying cash sum of RM3,000 for the payment of interest. According to the appellant, he had no knowledge of the contents of the said letter. At that point in time, CY Tan had already sold the said land to another buyer after the
- B said option had expired. The appellant then wrote to the respondent informing the respondent that the respondent had not given any notification to CY Tan to exercise the said option under the SPA. The respondent went to the appellant's firm and informed the appellant he wanted the return of the land and that
- C the entire transaction was a moneylending transaction. The appellant claimed that the said option had expired without the respondent ever exercising his rights thereunder. The respondent thus lodged a private caveat on the said land ('the caveat'). CY Tan made an application to remove the caveat, thus the
- D respondent filed an originating summons 24(L)-217-2010 ('the OS case') praying for an extension of time of the caveat which was dismissed. The respondent then filed Civil Suit No. 22-182-2010 ('Civil Suit 2010') and prayed for, amongst other things, a declaration that the transfer of the said land to CY Tan was
- E invalid. The said Civil Suit 2010 was also dismissed. The respondent lodged a complaint against the appellant with the DB. After a full hearing on the complaint, the DC unanimously found the appellant liable and held that he was guilty of gross improper conduct and had acted against the interest of the respondent. The
- F DC made, amongst other things, the following findings of the fact in support of its decision that (i) the appellant knew or ought to know that it was a money lending transaction; (ii) the appellant appeared to have colluded with one BC Tan, a property introducer, to deprive the respondent of his land; and (iii) the
- G appellant did not follow the normal rules and practice prevalent amongst conveyancing lawyers.

Held (allowing appellant's appeal; setting aside decision of DB with costs):

- H (1) The findings and recommendations of the DC which were subsequently affirmed by the DB in its decision ran counter to the facts as adduced by the respondent before the DC. The respondent's allegations concerned deceit and moral turpitude and therefore the requisite standard of proof was
- I beyond reasonable doubt. (para 32)

- (2) The DC had made a finding that the appellant had caused a PA to be granted to BC Tan for the period from the date of the SPA to the date of obtaining consent for the sanction of the sale and purchase of the said land. The said PA was between the respondent as the donor and CY Tan as the donee. BC Tan was never featured in the said PA. Thus, the DC had made a fundamentally wrong finding of fact in this regard. (para 33) A B
- (3) The respondent's complaint revolved around the issue of moneylending by BC Tan to the respondent. Neither BC Tan nor his alleged nominee CY Tan was called by the respondent to testify on the amount of monies lent and the terms of the purported moneylending. The DC did not address the issue of facts proved by the respondent with regard to the so-called moneylending transaction. In the circumstances, the DC could not have come to the conclusion that the said land transaction, just because it had a "cooling-off period" smacked of a loan transaction. The DC had misdirected itself in finding the appellant culpable of deceit, misrepresentation and/or cheating the respondent, without more, when it ruled that the appellant was guilty of gross improper conduct. (para 34) C D E
- (4) The DC's finding that the appellant had colluded with BC Tan to deprive the complainant of his land was fundamentally flawed in that for there to be collusion, there need necessarily be the involvement of more than one party. The DC had made the finding of collusion without the evidence of BC Tan nor of CY Tan, and had relied on the strength of its belief in the truthfulness of the respondent's testimony. (para 38) F
- (5) Allowing the appellant's appeal was consonant with the findings of facts in the OS case and the Civil Suit 2010. To do otherwise would result in an untenable position whereby the decision and the findings of facts of the High Court in the two said cases would have been overturned by the DC/DB, after a full trial in the case of the Civil Suit 2010 at that. The strength of the respondent's case in the disciplinary proceedings could not be better than that in the Civil Suit 2010 seeing that it was prosecuted after the respondent lodged his complaint with the DB. In the circumstances, the DB, in affirming the findings and recommendation of the DC, had taken into account irrelevant considerations, afforded insufficient appreciation of the evidence that had been presented before the DC and misapplied the relevant law. (para 40) G H I

A Case(s) referred to:

Au Kong Weng v. Bar Committee, Pahang [1980] 1 LNS 4 (**refd**)
Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 (**refd**)
Jerald Allen Gomez v. Shencourt Sdn Bhd; Majlis Peguam (Intervenor)
[2006] 1 CLJ 88 (**refd**)
B *Keith Sellar v. Lee Kwang and Tennakoon V Lee Kwang* [1980] 1 LNS 36
(**refd**)

Legislation referred to:

Legal Profession Act 1976, s. 103A(1), 103E

C *For the petitioner - James Khong; M/s James Khong*
For the respondent - Pang Kong Seng; M/s KS Pang & Co
For the intervener - Tasha Marian Periera; M/s Trevor George Partnership

Reported by Suhainah Wahiduddin

D**JUDGMENT**

Umi Kalthum Abd Majid J:

E The Appeal

F [1] The appellant appealed against the decision of the Disciplinary Board (“DB”) dated 17 March 2012 (“the said decision”) under s. 103E of the Legal Profession Act 1976 (“the Act”) affirming the finding of liability and recommendation on punishment by the Disciplinary Committee (“DC”) and ordering that the appellant be suspended from practice as an advocate and solicitor of the High Court in Malaya for a period of one year and prayed for the said decision be set aside, and for costs of and incidental to this appeal be paid by the respondent.

G**Preliminaries**

H [2] Pursuant to an interim order granted by me on 6 April 2012, in respect of the appellant’s application for a stay of the said decision pending the disposal of this appeal in encl. 5, the execution of the said decision had been stayed pending the disposal of encl. 5.

I [3] On the same date, learned counsel for the Bar Council indicated to the court that the Bar Council wished to intervene in these proceedings and to object against the application for a stay in encl. 5.

[4] On 12 April 2012, upon no objections being raised by the appellant, I allowed the Bar Council's application to intervene in these proceedings. At the same time, and upon no objections being raised by the Bar Council, I had allowed the appellant's stay application in encl. 5 pending the disposal of the appellant's appeal in encl. 2.

A

B

[5] There were two other proceedings filed in this court by the respondent against Tan Beng Chai ("BC Tan") and Tan Chun Yong ("CY Tan") in Civil Suit No. 22-182-2010 ("the Civil Suit 2010") and against Tai Chun Yong ("CY Tan") in Originating Summons 24(L)-217-2010 ("the OS case") pertaining to the same subject matter as the subject matter of his complaint to the DB of the Bar Council against the appellant.

C

[6] During the preliminary stages of this appeal, I had already delivered the decision in regard to the OS case on 10 February 2011, whereby I had dismissed the respondent's application for extension of time of the private caveat lodged by him over a piece of land known as HS(M)6465 PTD No. 8025, Mukim Sri Medan, Batu Pahat, Johor ("the said land") with costs.

D

E

[7] This appeal was kept in abeyance until I had delivered my decision in respect of the Civil Suit 2010 on 8 June 2012, whereby I had dismissed the respondent's claim against the defendants with costs.

F

Facts

The Said Land Transaction

[8] On or around 19 June 2009, the appellant was instructed by CY Tan to act for him in the purchase of the said land. The respondent was then the owner and vendor of the said land.

G

[9] The appellant was given to understand by CY Tan that the parties' instructions were, amongst other things, as follows:

H

- (a) the purchase price of the said land shall be RM100,000;
- (b) CY Tan had already paid the deposit of RM10,000 to the respondent to secure the purchase of the said land;
- (c) the balance of the purchase price of RM90,000 paid to the appellant's firm shall be disbursed to the respondent upon execution of the sale and purchase agreement;

I

- A (d) the respondent was given the option to re-purchase and/or terminate the sale of the said land (“the said option”) within six months from the date of the sale and purchase agreement (“the cooling-off period”). In such event, the respondent shall refund all the sums paid to CY Tan and upon such refund,
- B CY Tan shall execute a revocation agreement to revoke the sale and remove any caveat that he may have lodged on the said land;
- C (e) CY Tan was also given the liberty to terminate the sale of the said land in the event the consent of the State Authority for the sale was not obtained within six months from the date of the sale and purchase agreement;
- D (f) as the respondent wanted payment of the full purchase price of RM100,000 upon execution of the sale and purchase agreement, a power of attorney to deal with the said land shall be executed by the respondent for the benefit of CY Tan, the costs of which was to be borne by the respondent;
- E (g) the respondent elected not to be represented to save legal costs.

[10] On 22 June 2009, the respondent together with his son went to the appellant’s office to execute a sale and purchase agreement (“SPA”), an undated memorandum of transfer and power of attorney in respect of the said land. The appellant had explained to the respondent in English and Hokkein the terms of the SPA and went on to execute the SPA, the power of attorney in consideration of the payment of the full purchase price. The cheque for the balance purchase price in the name of Tan Chim Peng, the respondent’s son, was issued by the appellant’s firm as instructed by the respondent. The cheque was for RM89,200 (exh. ‘CCF-6, p. 22 encl. 3) after deducting the agreed sum of RM800 for services rendered by the appellant in the preparation of the Power of Attorney from the balance purchase price of RM90,000. A receipt had been issued dated 22 June 2009 for the said transaction (exh. ‘CCF7, p. 23, encl. 3) and the respondent had signed it.

[11] On 4 December 2009, the registration of the said land in CY Tan’s name was effected after obtaining the State Authority’s consent for the transfer on or around 4 November 2009.

Events After The Said Land Transaction

A

[12] Approximately seven months after the signing of the SPA and after the said option had lapsed, the appellant's clerk was handed the respondent's letter dated 21 January 2010 (exh. 'CCF-10', p. 29, encl. 3) together with cash amounting to RM3,000 at the appellant's firm by a representative of the respondent. The said letter in gist:

B

(a) made reference to the said land;

(b) made reference to the SPA;

C

(c) referred to the payment of interest on 22 July 2009 *vide* cheque dated 22 July 2007 for the month of July 2009 for the sum of RM3,000;

(d) referred to the accompanying cash sum of RM3,000 for the payment of interest for the month of August 2009;

D

(e) stated that there was an outstanding payment of interest for September, October, November, December 2009 and January 2010;

E

(f) stated that such outstanding payments would be satisfied as soon as possible.

[13] According to the appellant, he had no knowledge of the contents of the said letter. He had contacted BC Tan, who then came to the appellant's office to collect the said RM3,000. The appellant was informed by BC Tan that the respondent still owed BC Tan money over cheque exchanges and friendly loans, which was of no concern to the appellant.

F

G

[14] Seeing that the respondent's letter was addressed to the appellant's firm and carried the particulars of the said land, the appellant felt the need to make a reply. At that point in time CY Tan had already sold the said land to another buyer on 23 December 2009 after the said option had expired. The appellant then wrote to the respondent on the same day (21 January 2010) informing the respondent that:

H

(a) since six months had elapsed from the date of the SPA;

(b) the respondent had not given any notification to CY Tan to exercise the said option under the SPA; and

I

(c) the said land had been properly transferred to CY Tan.

- A [15] On 8 February 2010, the respondent went to the appellant's firm and informed the appellant that the entire transaction was a money lending transaction and that BC Tan was a moneylender. The respondent wanted the return of the said land. The appellant claimed that he did not have any knowledge as to the veracity of
- B the respondent's allegations and that in any case nothing could be done by the appellant as the said option had expired without the respondent ever exercising his rights thereunder.
- C [16] The respondent then on 9 February 2010 lodged a private caveat on the said land ("the caveat"), which became the subject matter of the OS case.
- [17] The respondent then on 17 February 2010 lodged a police report ("the said police report").
- D [18] On or around 8 March 2010, the Batu Pahat Land Administrator issued the Form 19C to the respondent informing the respondent that CY Tan had made an application to remove the caveat.
- E [19] In response, the respondent lodged a complaint on 5 April 2010 against the appellant with the DB.
- [20] A day after lodging the complaint against the appellant with the DB, the respondent filed the O.S. case on 6 April 2010 praying for, amongst other things, the following orders:
- F (a) extension of time of the caveat pending the completion of the investigation of the said police report and or the decision of the court in respect of the writ action which would be filed within seven days after the court's order.
- G [21] The OS case was dismissed on 10 February 2011, and there was no appeal filed against that decision.
- [22] The respondent then filed the Civil Suit 2010 on 23 December 2010 and prayed for, amongst other things, a
- H declaration that the transfer of the said land to CY Tan was invalid. The appellant was never made a party to the Civil Suit 2010, but was called as a witness.
- I [23] On 7 October 2011, the DC found the appellant guilty in relation to the respondent's complaint.

[24] On 17 March 2012, a 13-member DB unanimously affirmed the finding of liability and recommendation of a 1-year suspension from practice of the DC against the appellant. A

[25] As stated earlier, on 8 June 2012, I had dismissed the Civil Suit 2010 with costs. B

The Disciplinary Proceedings

[26] Following from the respondent's complaint, the DB had on 14 May 2011 appointed a DC under s. 103A(1) of the Act. The DC consisted of three members to investigate the respondent's complaint. After a full hearing on the complaint, the DC unanimously found the appellant liable and held that he was guilty of gross improper conduct and had acted against the interest of the respondent. The DC made, amongst other things, the following findings of the fact in support of its decision: C D

- (a) that the appellant knew or ought to know that it was a money lending transaction;
- (b) the appellant appeared to have colluded with one BC Tan, a property introducer, to deprive the respondent of his land; E
- (c) the appellant did not follow the normal rules and practice prevalent amongst conveyancing lawyers.

[27] The DC recommended a 1-year suspension against the appellant (p. 365, encl. 17). F

[28] In affirming the finding of liability and recommendation of penalty by the DC on 17 March 2012, the DB had reached that decision after hearing submissions from the appellant's counsel. G

Decision

[29] I allow the appellant's appeal and set aside the decision of the DB with costs at RM5,000 to be paid by the respondent in favour of the appellant and RM2,000 to be paid by the intervener in favour of the appellant. I do so for the following reasons. H

[30] Case law has shown that the judiciary consistently emphasized that it will exercise caution when entertaining an appeal and will not normally interfere with the decision of the DB, unless there are compelling reasons for it do so. This has been so I

A decided in the Court of Appeal case of *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878 where Justice Gopal Sri Ram (JCA) (as he then was) ruled as follows at p. 881, paras. d-g:

B It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour. We would, in this context, express our agreement with the following passage in the Guide to the Professional Conduct of Solicitors issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:

C

D

One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.

E

In our judgment, a court will be entitled to interfere only if what has been found by a disciplinary committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

F

[31] Bearing in mind *Gana Muthusamy's* case, I am compelled to interfere with the DB's decision. This is because the findings and recommendations of the DC and which were subsequently affirmed by the DB in its decision run counter to the facts as adduced by the respondent before the DC. Learned counsel for the intervener submitted that this court should not take into account what transpired in the OS case and the Civil Suit 2010 and should focus its mind only on what was adduced at the disciplinary proceedings, when deciding this appeal. In his submission, learned counsels for the respondent and the appellant had alluded to the same facts which were pleaded in the OS case as well as the Civil Suit 2010, as if these two cases were to be litigated all over again in the disciplinary proceedings with a big difference, that is, the appellant was never made a party to the OS case and the Civil Suit 2010 nor sued separately. The appellant's involvement was only as a witness for the defendant in

G

H

I

the Civil Suit 2010. In any event, I am not precluded from doing so - see *Jerald Allen Gomez v. Shencourt Sdn Bhd; Majlis Peguam (Intervenor)* [2006] 1 CLJ 88. A

[32] The DC found the appellant guilty of “gross improper conduct” in the said land transaction and for having acted against the interest of the respondent. In view of the respondent’s complaint to the DB, I agree with the submission of the appellant that the respondent’s allegations concerned deceit and moral turpitude and therefore the requisite standard of proof is beyond reasonable doubt based on the Federal Court decisions in *Au Kong Weng v. Bar Committee, Pahang* [1980] 1 LNS 4 and *Keith Sellar v. Lee Kwang and Tennakoon V Lee Kwang* [1980] 1 LNS 36, and the High Court appeal case of *Jerald Allen Gomez (supra)*. B C

The Power Of Attorney (“PA”) D

[33] At p. 430 of encl. 3A, the DC made the finding that the appellant had caused a PA to be granted to BC Tan for the period from the date of the SPA to the date of obtaining consent for the sanction of the sale and purchase of the said land. Based on the PA prepared by the appellant found at p. 149, encl. 3A, the said PA was between the respondent as the donor and CY Tan as the donee. BC Tan was never featured in the said PA). I therefore find that the DC had made a fundamentally wrong finding of fact in this regard which had led the DC to hold in the next sentence that: E F

It appears that everything was done to protect the interest of Tan Beng Chai (BC Tan) and his nominee and scant attention was paid to the complainant.

Deceit, Misrepresentation And/Or Cheating G

[34] The respondent’s complaint revolved around the issue of moneylending by BC Tan to the respondent. Neither BC Tan nor his alleged nominee CY Tan was called by the respondent to testify on the amount of monies lent and the terms of the purported moneylending. Other than stating that: H

The committee found the complainant to be truthful.

the DC did not address the issue of facts proved by the respondent with regard to the so-called moneylending transaction. I do not, in the circumstances, see how the DC could come to I

- A the conclusion that the said land transaction, just because it had
a “cooling-off period”, “smacks of a loan transaction”. I am not
aware of any decided cases that have ruled that whenever there
is a “cooling-off period” stipulated in a sale and purchase
agreement it smacks of a loan transaction. Neither am I aware
B that a sale and purchase agreement of a property need to comply
with “standard terms” of contract (other than that under the
Housing Development (Control and Licensing) Act 1966) where
any deviations thereof adverse implications could be invoked
against the parties, including the counsel who drew up the
C agreement. In fact, the term “cooling-off period” has been defined
by *Black’s Law Dictionary*, 7th Edn, West Group, 1999 as:

cooling-off period. 1. During a dispute, a period during which
no action may be taken by either side. 2. A period during which
a buyer may cancel a purchase ...

- D That being the case, I find that the DC had misdirected itself in
finding the appellant culpable of deceit, misrepresentation and or
cheating the respondent, without more, when it ruled that the
appellant was guilty of gross improper conduct.

E *Moneylending Transaction*

- [35] With the same token, I agree with the submission of the
appellant that the respondent ought first to prove there existed a
moneylending transaction between himself and BC Tan before the
F respondent can transpose that transaction to the appellant. As the
respondent had failed to prove the moneylending transaction in
the first place, the DC could not have sustained its finding that
the land transaction “smacks of a loan transaction” and following
G from that that the appellant had done everything to protect the
interest of BC Tan and CY Tan.

- [36] In this regard, the purported evidence which the respondent
had adduced was a receipt at p. 85, encl. 3A, which the
respondent had alleged to have been prepared by the appellant for
H his signature and which was of questionable probative value. The
said receipt purportedly provided that the full purchase price shall
be RM90,000, the respondent was liable to pay RM18,000 as
“deposit refund and damages (six months)” in the event of
termination on the part of the respondent when he exercised his
I option.

[37] In the first place, the appellant denied producing nor authoring the said receipt. Secondly, the appellant submitted that the said receipt had provided that liquidated damages as stipulated in cl. 10 of the SPA was to be relied upon in the event of termination by the respondent. Clause 10 in turn stated that 10% of the purchase price shall be agreed liquidated damages. In the circumstances, 10% of RM100,000 or even of RM90,000 did not add up to RM18,000. The authenticity and content of the said receipt as relied upon by the respondent was therefore doubted to have been produced by the appellant. And yet the DC had found that:

... the sum of RM18,000.00 paid by the complainant to Tan Beng Chai was for 6 months interest at RM3,000.00 per month. (page 429, enclosure 3A).

It appears to me that in wanting to find for the respondent, the DC had totally disregarded the coherency of the said receipt in the first place and transposed its own logic for that of the receipt itself. That receipt is in contrast to the one admitted by the appellant to have been issued by his firm on p. 158, encl. 3A, which had no such amount of RM18,000 stipulated. I therefore find the DC's conclusion as being irrational.

Collusion

[38] The DC found that the appellant had "colluded with Tan Beng Chai to deprive the complainant of his land" (p. 430, encl. 3A). In this, I agree with the submission of the appellant that the DC's finding was fundamentally flawed in that:

- (a) for there to be collusion, there need necessarily be the involvement of more than one party. The DC had made the finding of collusion without the evidence of BC Tan nor of CY Tan, and had relied on the strength of its belief in the truthfulness of the respondent's testimony and the impugned receipt on p. 85, encl. 3A as against the Appellant's testimony;
- (b) the documentary evidence adduced did not implicate BC Tan nor involve him.

A Conclusion

[39] My allowing the appellant's appeal is consonant with the findings of facts by me in the OS case and the Civil Suit 2010. To do otherwise would result in an untenable position whereby the decision and the findings of facts of the High Court in the two said cases would have been overturned by the DC/DB, after a full trial in the case of the Civil Suit 2010 at that. The strength of the respondent's case in the disciplinary proceedings to my mind could not be better than that in the Civil Suit 2010 seeing that it was prosecuted after the respondent lodged his complaint with the DB.

[40] In the circumstances, I find that the DB, in affirming the findings and recommendation of the DC, had:

- D** (a) afforded insufficient appreciation of the findings of fact in the OS case;
- (b) taken into account irrelevant considerations;
- E** (c) paid little or no attention to relevant considerations;
- (d) afforded insufficient appreciation of the evidence that had been presented before the DC;
- (e) misapplied the relevant law.

F

G**H****I**